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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-619

SAVE OUR CUMBERLAND MOUNTAINS, INC.;
J. W. BRADLEY, President,
Save Our Cumberland Mountains, Inc., ... Petitioners,

vs.

TENNESSEE VALLEY AUTHORITY;
AUBREY WAGNER, Chairman,
Tennessee Valley Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Page

Citation To Opinion Below 1

Jurisdiction 2

Statutory Provisions Involved 2-3

Questions Presented 3-4

Statement of The Case 4-10

Reasons For Granting The Writ:

I. THE QUESTION WHETHER A FEDERAL AGENCY MAY BE ENJOINED FROM FOSTERING, THROUGH CONTRACTUAL ACTIVITY, THE FRUSTRATION OF SHARPLY DEFINED STATE LAW IS ONE OF NOVEL IMPORTANCE TO ALL FEDERAL AGENCIES AND TO OUR SYSTEM OF FEDERALISM 10-18

II. THE FAILURE OF THE LOWER COURTS TO CONSIDER PETITIONERS' CLAIM ARISING UNDER SECTION 102(2)(c) OF NEPA, WHICH WAS PLAINLY INCLUDED ON THE FACE OF THE COMPLAINT AND STATES A PRIMA FACIE CAUSE OF ACTION, CONSTITUTES A SERIOUS ABUSE OF DISCRETION WHICH THIS COURT SHOULD CORRECT. 18-20

Conclusion 20

Appendix:

Order of the United States Court of Appeals .. 1a

Order Denying Petition for Rehearing 2a

Order and Memorandum of the District Court 3a-5a

Complaint 6a-20a

TABLE OF AUTHORITIES

CASES: Page

Elkins v. *United States*,
364 U.S. 206 (1960) 16

Green v. *Connally*,
330 F. Supp. 1150 (D.D.C. 1971) 16

Hanly v. *Kleindienst*,
471 F.2d 823 (2d Cir. 1972) 19

Illinois v. *City of Milwaukee*,
406 U.S. 91 (1972) 12

National Coal Board v. *Gamble*,
42 Cr. App. R. 240 (Div. Ct. 1958) 14

National Licorice Co. v. *NLRB*,
309 U.S. 350 (1950) 13

Natural Resources Defense Council v. *TVA*,
5 ERC 1669 (E.D. Tenn. July 24, 1973) 20

Olmstead v. *United States*,
277 U.S. 438 (1928) 13

Samuels v. *Mackell*,
401 U.S. 66 (1971) 17

Save Our Ten Acres v. *Kreger*,
472 F.2d 463 (5th Cir. 1973) 19

Tank Truck Rentals, Inc. v. *Commissioner of Internal Revenue*, 356 U.S. 30 (1950) 14-15

Younger v. *Harris*,
401 U.S. 37 (1971) 10

STATUTORY PROVISIONS:

28 U.S.C. Sec. 1254(1) 2
28 U.S.C. Sec. 1331(a) 2, 11, 12, 13
28 U.S.C. Sec. 1361 ..... 2, 11
42 U.S.C. Sec. 4332(2) 2, 4, 18
Tenn. Code Ann. Sec. 59-1109 6
Tenn. Code Ann. Sec. 59-1112 ..... 6, 8

ADMINISTRATIVE REGULATIONS:

18 C.F.R. Sec. 300.735-1 et seq. 17

OTHER SOURCES:

C. Harvey, *The Economic Impact of Enforcing Weight Restrictions on Eastern Kentucky Roads* (monograph prepared by the Office of Development Services and Business Research, College of Business and Economics, University of Kentucky) 7

L. Jaffe, *Judicial Control of Administrative Action* (1965) 17

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TENNESSEE VALLEY AUTHORITY;
AUBREY WAGNER, Chairman,
Tennessee Valley Authority, ... Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on June 14, 1973.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is included in the Appendix, *infra,* p. 1a. The Order of the District Court is set forth in the Appendix, *infra,* p. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on June 14, 1973. Petitioners' Petition For Rehearing was denied on July 11, 1973 (a copy of this Order is included in the Appendix, *infra*, p. 2a.) The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. Sec. 1331(a):

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. Sec. 1361:

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

42 U.S.C. Sec. 4332(2)(c):

> "[A]ll agencies of the Federal Government shall — include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of title 5, United States code, and shall accompany the proposal through the existing agency review processes;"

QUESTIONS PRESENTED

1. May a federal agency be enjoined on the basis of fundamental principles of federalism and federal-state comity from fulfilling obligations under contracts whose performance entails pervasive violations of state law?

2. Did TVA fail to comply with the procedural requirements of Sec. 102(2)(c) of the National Environmental Policy Act of 1969, 42 U.S.C. Sec. 4332 (2)(c), by not preparing an adequate environmental impact statement considering the significant environmental consequences flowing from the transportation of coal to TVA facilities?

STATEMENT OF THE CASE

The petitioners, Save Our Cumberland Mountains, Inc., (hereinafter referred to as SOCM) and J.W. Bradley, President of SOCM, filed suit in the United States District Court for the Eastern District of Tennessee on September 25, 1973, against the Tennessee Valley Authority (hereinafter referred to as TVA), charging TVA with contravening standards of conduct for federal agencies grounded in federal law by accepting on the property of its Kingston Steam Plant substantial numbers of deliveries of coal from its contractors tendered in trucks operated in violation of the weight and dimensional limitations prescribed by Tennessee statutes. Detailing how the continuous operation of these overweight vehicles desecrated the roads upon which its members traveled, SOCM urged the Court to declare TVA's involvement in its contractors' activity to be in frustration of sharply defined state policy and to enjoin TVA from accepting further deliveries tendered unlawfully. The complaint also alleged that TVA was not complying with section 102 (2)(c) of the National Environmental Policy Act of

1969 (hereinafter referred to as NEPA), inasmuch as TVA had not filed an adequate environmental impact statement, in compliance with Sec. 102(2)(c), discussing the significant environmental effects of the transportation of coal to TVA facilities. The District Court dismissed petitioners' complaint, citing F.R.C.P. 12 (b)(1),(6), & (7) in support of its ruling. This judgment was affirmed by the Court of Appeals.

As the nation's largest producer of electric power and its most plentiful consumer of coal, TVA enters into many long and short term contracts with private mine operators for the purchase of coal. In upper east Tennessee, TVA has a longstanding history, dictated by the economics of the industry in this area, of contracting with many of the same operators, whether on a long or short term basis. As a result, TVA over the years has gained substantial familiarity and insight into the methods — particularly, their record of compliance with state law — these contractors use to meet their contractual obligation of supplying coal to such generating facilities as the Kingston Steam Plant, Kingston, Tennessee (hereinafter referred to as steam plant), the focal point of this action. This steam plant receives about two million tons of coal each year, about twenty-five percent of the total output in east Tennessee, much of which is transported over a network of county, state, and federal highways in gigantic trucks whose gross weight consistently exceeds the 73,280 pound maximum allowed by Tennessee law. Immediately upon arriving at the plant, often in a

steady stream, the trucks are weighed by TVA and the coal is dumped into TVA's storage yard or hopper.

As conceded by TVA in this action, a substantial number of the many trucks delivering coal to the steam plant exceed the maximum permissible gross weight limitation of 73,280 pounds contained in *Tenn. Code Ann.* Sec. 59-1109. Moreover, many of the trucks are in violation of the per axle weight, height, and length limitations contained in section 59-1109, which states in unusually emphatic terms: "[I]t is the legislative intent that the prescribed weight, height, and length limit shall be strictly enforced and it shall be unlawful for any state, county, or municipal officer to allow or permit any additional weight, height, or length by way of tolerance or otherwise." Pursuant to *Tenn. Code Ann.* Sec. 59-1112, any violation of section 59-1109 constitutes a misdemeanor subjecting the offender to a fine of not less than $25.00 nor more than $500.00 for each violation.

SOCM is a grassroots citizens group with some 200 members living in Tennessee's five largest coal counties. The members of SOCM have long been concerned about the dangers generated by the unabated flow of overweight coal trucks to the steam plant. Literally tearing through the pavement of roads used extensively by SOCM members in their daily intercourse, these overburdened coal trucks leave in their wake giant potholes, sharp indentations, numerous crags and gulleys, and an obstacle course of large coal chunks. As a result of this massive damage over miles of bucolic, rural roadway, SOCM members are injured

in a variety of ways: (1) their automobiles are subject to extraordinary damage; (2) their safety is threatened every time they take behind the wheel; (c) their counties are forced to allocate a disproportionate share of tax revenues to keep the roads minimally passable, thus depriving these counties, some of Tennessee's poorest, of money for necessary social services; (4) their continued existence in their ancestral area is threatened since the absence of good roads inhibits industrial development and tourism; and (5) their aesthetic sensibilities are constantly jarred by the impairment of their immediate environment. By having to endure these many deprivations, the petitioners wind up subsidizing cheap electricity for all other TVA consumers.*

Prior to initiating this action, SOCM exhorted the responsible state authority, the Tennessee Department of Revenue, to halt the unremitting flow of overweight vehicles to the steam plant. While acknowledging the seriousness of the situation, the state replied that it did not possess sufficient manpower to patrol this large geographical area for violations. When asked why a check-point could not be established immediately outside the steam plant, the eventual destination of all trucks, the state replied that the establishment of such a check-point would entail serious

*See C. Harvey, *The Economic Impact of Enforcing Weight Restrictions on Eastern Kentucky Roads* (1971) (monograph prepared by the Office of Development Services and Business Research, College of Business and Economics, University of Kentucky)

dangers to the inspectors, truckers, and passing motorists because the roadway was too narrow to accomodate safely the portable scales used by the inspectors. Subsequent contact with state officials by SOCM representatives revealed their belief that blanket rejection by TVA of overweight deliveries was the only effective solution to the problem and that such action by TVA would materially assist the state's law enforcement efforts.

Unable to obtain relief from the state, petitioners were faced with the choice of bringing a multiplicity of lawsuits under an exceptionally standardless statute (*Tenn. Code Ann.* 59-1112) in numerous state forums traditionally solicitous to the interests of the coal truckers, or attempting to gain complete relief in one federal forum based on TVA's complicity in the illegal actions of their contractors. Ironically, two months before the commencement of this action, TVA announced that it would begin enforcing a policy of rejecting the trucks of short term contractors not in compliance with the Tennessee weight scheme. TVA founded this authority on contractual clauses inserted in the short-term contracts, provisions not existing in long-term contracts negotiated years earlier and under which the bulk of trucked coal was delivered. After only one day of enforcement, TVA succumbed to the protests of the short-term contractors, mostly small operators, who claimed that TVA was unfairly discriminating against them in an alleged attempt to force them out of business to the profit of the long term, larger contractors.

By letter of August 25, 1972, petitioner J.W. Bradley, on behalf of the members of SOCM, urged TVA immediately to impose a policy of blanketly rejecting all trucks not in conformance with state law. The letter recounted the pervasive damage caused by the overweight vehicles and the consequent injury to members of SOCM and residents of the area and reminded TVA of its statutory mandate to foster the economic well-being of *all* citizens in its area of operations. TVA's reply, through Chairman Aubrey Wagner, summarized TVA's abortive enforcement effort and justified its current policy on grounds of contractual obligation.

Failing to obtain redress from TVA, petitioners filed a Complaint in the United States District Court for the Eastern District of Tennessee (a copy of this Complaint is included in the Appendix, *infra*, p. 6a) requesting declaratory and injunctive relief. In addition to the overriding claim seeking to impose upon TVA the responsibility of rejecting illegally overweight deliveries, petitioners also asserted that, in view of the widespread damage resulting from the transportation of coal to TVA facilities, TVA's failure to prepare an environmental impact statement or include in its existing program statement a discussion consistent with section 102(2)(c) of NEPA constituted a violation of federal law. Following a hearing on petitioner's Motion For a Preliminary Injunction in which only oral argument by counsel was permitted, the District Court entered an Order accompanied by a short memorandum opinion dismissing the action. Failing entirely to consider petitioners' NEPA claim, despite the fact that this

claim had been briefed extensively in petitioners' Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction, the District Court couched "[t]he gravamen of the complaint [to be] the failure of TVA to enforce a state statute against a non-party to this action." Having thus framed the issue, the District Court found that no federal right or immunity was being violated by TVA's policies and cited recent cases of this Court dealing with federal intervention in state criminal proceedings (e.g. *Younger* v. *Harris*, 401 U.S. 37 (1971) as support for the proposition that "[t]he Governor of Tennessee is charged with the responsibility for enforcing state laws, not TVA." The Court of Appeals affirmed this judgment "for the reasons set forth in the order of the district court."

REASONS FOR GRANTING THE WRIT

I.

THE QUESTION WHETHER A FEDERAL AGENCY MAY BE ENJOINED FROM FOSTERING, THROUGH CONTRACTUAL ACTIVITY, THE FRUSTRATION OF SHARPLY DEFINED STATE LAW IS ONE OF NOVEL IMPORTANCE TO ALL FEDERAL AGENCIES AND TO OUR SYSTEM OF FEDERALISM.

The basic question first raised in this case is whether a federal court may impose responsibility on a federal agency to conduct its business with its contractors in a way which does not result in the systematic violation of state law. Throughout this case, TVA has

argued that only the state of Tennessee — either through its state enforcement personnel or its judiciary — has the duty of enforcing state weight statutes flagrantly ignored by virtually all of TVA's contractors. Petitioners recognize this responsibility on the part of the state but also contend that TVA has a responsibility — rooted in fundamental principles of federalism and federal agency conduct — to cease any activity on its part that contributes in any way to the widespread violation of sharply defined state law and policy.

Although inconsistently dismissing the Complaint both for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted, the District Court — concurred in by the Court of Appeals — focused on the former ground in its opinion. Petitioners submit that this is an issue peculiarly cognizable by a federal court under either 28 U.S.C. Sec. 1331(a), 28 U.S.C. Sec. 1361, or certainly as an ancillary claim to petitioner's NEPA allegations discussed *infra*. To abdicate jurisdiction in a case as compelling as this is to close the federal courts to any citizen who is injured by activities attributable to a federal agency and to allow such an agency to sit back and reap the benefits of illegal activity while disclaiming responsibility for it.

Throughout this litigation, petitioners have contended that the general federal question statute was designed to reach the situation presented by this case. It has not been disputed that the first prong of 28

U.S.C. Sec. 1331(a), requiring the matter in controversy to exceed $10,000, exclusive of interests and costs, is satisfied by petitioners' Complaint. The considerable interests of the petitioners in free and unimpaired road travel would seem to put beyond question the jurisdictional amount provided in Sec. 1331(a).

The second requirement of Sec. 1331 (a), that the action arises under the Constitution, laws, or treaties of the United States, is likewise satisfied by the allegations of claimed rights, in particular under the Tennessee Valley Authority Act of 1933, 16 U.S.C. Sec. 831 *et seq.* For jurisdictional purposes only, petitioners contend that it is enough to claim colorable rights under federal law arguably intended to protect them. Whether these laws yield the claimed rights is a question that goes to the merits of this controversy and can only be answered following a full factual hearing and consideration of the relevant law.

A broader approach to the question of jurisdiction more strongly supports petitioners' position. In *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972), a unanimous Court, rejecting the argument that parties must point to a specific federal statute as a prerequisite to invoking federal jurisdiction under Sec. 1331(a), expansively interpreted the word "laws" in Sec. 1331(a) to include the broad range of federal common law. This interpretation has direct import for this issue. Petitioners' dominant contention, discussed *infra,* is that as a matter of sound federalism as expounded in decisions of this Court, a federal court should enjoin a federal agency from activity

that materially frustrates the operation of a state statute. This contention, deriving its very existence from federal common law and the Constitution, should be sufficient to support jurisdiction under the second prong of Sec. 1331 (a). Minimally, this Court should grant certiorari to clarify the lower courts' restrictive interpretation of jurisdiction under Sec. 1331(a).*

No less is implicated in the merits of this case than the paramount issue of governmental lawlessness. The general federal policies underlying this issue were well stated in the dissent of Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438 (1928):

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of law, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the

*Petitioners also believe that jurisdiction over this issue properly lies under 21 U.S.C. Sec. 1361 and under the concept of ancillary jurisdiction, the NEPA claim, *infra*, supplying clear grounds for jurisdiction to be assumed over the whole Complaint. The District Court also cited failure to join a party under Rule 19, F.R.C.P. 12(b)(7), as a ground for dismissal. Petitioners claim that this ground of dimissal is erroneous under the doctrine of *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1950), where this Court found public rights superior to contractual rights in an action to restrain the performance of contracts. In any event, even if it is concluded that TVA's contractors are indispensable parties to this action, petitioners should be given the opportunity to amend their Complaint to include such parties. Outright dismissal is simply too harsh a final outcome.

> omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto itself; it invites anarchy." *Id.* at 485

Whether it can generically be called aiding or abetting or conspiracy, TVA's activities in the present case exhibit the kind of turpitude that is antithetical to the proper functioning of a federal agency in our federal system. Well informed that the coal contracts it lets cannot be fulfilled without systematic violations of state law, TVA continues to accept the fruits of such contracts. TVA's rejection of responsibility for the destruction wreaked over miles of Tennessee roadway brings to mind the proverbial image of the three monkeys. It is hardly irresponsible to call such conduct criminal.*

The impropriety of TVA's activities in this case takes on added importance in the special context of federal-state relations in which all federal agencies are bound to operate. Under well recognized principles of federalism and federal-state comity, federal courts, as a matter of sound policy, should not tolerate conduct by a federal agency that serves to defeat explicitly elucidated state laws and policies. This proposition was firmly established in federal jurisprudence in a case remarkably analogous to the case at bar. In *Tank*

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*At common law, TVA's criminal culpability in knowingly accepting the illegally overweight deliveries is well established. *National Coal Board* v. *Gamble*, 42 Cr. App. R. 240 (Div. Ct. 1958) (Goddard, C.J., Devlin, Slade, JJ.)

Truck Rentals, Inc. v. *Commissioner of Internal Revenue*, 356 U.S. 30 (1956), this Court upheld the disallowance of deductions claimed by taxpayers, owners of a fleet of motor carriers, for fines and penalties imposed on them for violation of Pennsylvania statutes governing the maximum weight limit for trucks operated on commonwealth highways. The rationale of the unanimous Court is directly applicable to the facts of the instant case:

> "Here we are concerned with the policy of several states evidenced by penal statutes enacted to protect their highways from damage and to ensure the safety of all persons using them . . . It is clear that assessment of the fines was punitive action and not a mere toll for use of the highways. The fines occurred only in the exceptional instances when the overweight run was detected by the police. Petitioner's failure to comply with state laws obviously was based on a balancing of the cost of compliance against the chance of detection. Such a course cannot be sanctioned, *for judicial deference to state action requires, whenever possible, that a state not be thwarted in its policy. We will not presume that the Congress, in allowing deductions for income tax purposes, intended to encourage a business enterprise to violate the declared policy of a state. To allow the deductions sought here would but encourage continued violations of state law by increasing the odds in favor of noncompliance. This could only tend to destroy the effectiveness of the state's maximum weight laws.*" *Id.* at 34, 35. (emphasis added).

This reasoning underscores the strong judicial aversion to any governmental conduct that encourages violations

of state law and aptly sums up the central reason why this case is a decidely appropriate one for certiorari to be granted.

Although in a different context, the policy enunciated in *Tank Truck Rentals* was reaffirmed in *Elkins* v. *United States*, 364 U.S. 206 (1960), where this Court held that articles obtained as a result of an unreasonable search and seizure by state officials without the involvement of federal officers may not be introduced by federal officers against a defendant in a federal criminal trial. Hinging its reasoning on considerations of federalism, the opinion observed that it was improper for a federal official — whether overtly or tacitly — to encourage violation of state law and that the federal judiciary should not acquiesce in any activity of the federal government that serves to defeat valid state policy. *Id.* at 221-24. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), analogous reasoning was used in a suit brought by black federal taxpayers to enjoin the Secretary of the Treasury from granting tax exempt status to Mississippi private schools that discriminated against blacks. In upholding the arguments of the plaintiff on the public policy ground that such tax exemptions frustrated the national policy favoring integration of schools, the court again pointed out that federal courts have the power to correct the improper action of federal officials when such action defeats federal or state policy. It is this core principle of government that lies at the heart of the present case.

This Court's concern for the proper functioning of our federal system should prompt it to look askew at the

District Court's citations to *Samuels* v. *Mackell*, 401 U.S. 66 (1971) and *Younger* v. *Harris*, 401 U.S. 37 (1971), ostensibly to support the proposition that only the state — not TVA — has responsibility for guarding against violation of its statutes. If for this reason alone, this petition should be granted to correct the lower court's gross misimpression of the meaning of *Samuels* and *Younger*. As noted in the statement of facts, Tennessee would welcome the relief sought by petitioners here. Therefore, rather than "crippling" the state's enforcement efforts, as was the concern in *Samuels*, the relief sought by petitioners would further this Court's concept of federalism by recognizing TVA's special obligation as a federal agency to refrain from any activity that encourages the commission of a crime by those it does business with on a regular basis. See generally L. Jaffe, *Judicial Control of Administrative Action* 590-91 (1965).

Acceptance of this case for review would also provide this Court with a unique opportunity to construe and breathe life into the ethical standards governing the conduct of federal agency employees. TVA's ethical guidelines are found in 18 C.F.R. Sec. 300.735-1 *et seq.*, which state as their purpose "[t]he maintenance of unusually high standards of honesty, integrity, impartiality, and conduct by government employees. . . to assure the proper performance of the Government business and the maintenance of confidence by citizens in their Government." Specifically, these regulations proscribe TVA employees from engaging in any activity which might "[affect] adversely the confidence of the public in the integrity of TVA" (Sec. 300.735-11

(i)); restrain TVA employees from engaging in "criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government (Sec. 300.735-19); and hold TVA employees to the "Code of Ethics for Government Service," expressed in House Concurrent Resolution 175, 85th Cong., 2d Sess., 72 Stat. B 12, which requires any person in government service to "uphold the Constitution, laws, and legal regulations of the United States and of all governments therein *and never be a party to their evasion.*" (Sec. 300.735-20(a)) (emphasis added). Unless these regulations are mere empty vessels, it is the duty of the federal judiciary to conform agency conduct to the high standards set by these guidelines. By holding TVA to be in contravention of their own ethical regulations, this Court would be setting a salutary precedent at a time when confidence in government at all strata is notably low.

II.

THE FAILURE OF THE LOWER COURTS TO CONSIDER PETITIONERS' CLAIM ARISING UNDER SECTION 102(2)(c) OF NEPA, WHICH WAS PLAINLY INCLUDED ON THE FACE OF THE COMPLAINT AND STATES A PRIMA FACIE CAUSE OF ACTION, CONSTITUTES A SERIOUS ABUSE OF DISCRETION WHICH THIS COURT SHOULD CORRECT.

Paragraph 25(a),(b), & (c) of petitioners' Complaint explicitly alleges facts which, if taken as true, constitute a major violation of the procedural requirements of NEPA, 42 U.S.C. Sec. 4332(2)(c). Para-

graph 1(c) of the Prayer for Relief evinces that this discrete claim is an integral part of petitioners' overall action against TVA. Paragraphs 2 and 3 of the Complaint contain the necessary and sufficient jurisdictional allegations to confer jurisdiction over this straightforward environmental claim. Petitioners find it inconceivable, therefore, that this separate issue, briefed fully in both the District Court and the Court of Appeals, can evaporate without any judicial consideration merely because petitioners' distinct first cause of action is dismissed. As the overseer of the federal judiciary, it is incumbent on this Court to grant certiorari to correct this grave abuse of discretion by the lower courts, particularly since the claim involves an as yet unresolved question under NEPA.

The crux of this issue revolves around whether TVA's involvement with its coal contractors in their transportation of coal to TVA facilities amounts to "major Federal action significantly affecting the quality of the human environment." See generally *Save Our Ten Acres* v. *Kreger*, 472 F.2d 463 (5th Cir. 1973); *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972). If TVA's activities fall within the purview of this section, then it is obligated to file a detailed environmental impact statement on the environmental consequences of the transportation of coal to TVA facilities. TVA has already filed an environmental impact statement entitled "Policies Relating to Sources of Coal Used by the Tennessee Valley Authority for Electric Power Generation." This statement, purportedly covering all of the present and future actions by TVA dealing with coal procurement, contains

no mention of the environmental effects of the transportation of coal by truck or otherwise to TVA generating plants. Whether the issue boils down to the inadequacy of this statement, which subsequent to the filing of this action has been challenged on entirely separate grounds (*Natural Resources Defense Council* v. *TVA*, 5 ERC 1669 (E.D. Tenn. July 24, 1973) or the necessity of TVA having to file an independent impact statement, the failure of the lower courts to consider this issue at all is an error of such magnitude that review of this case or outright reversal by this Court is the only recourse left for petitioners in their attempts to hold TVA partially accountable for the destruction of their immediate environment.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Sixth Circuit.

Respectfully submitted,

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